No. 14755

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

RECONSTRUCTION FINANCE CORPORATION,
a corporation, *Appellant,*

vs.

SULLIVAN MINING COMPANY,
a corporation, *Appellee.*

APPELLANT'S OPENING BRIEF

Upon Appeal from the District Court of the United States for the District of Idaho Northern Division

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JURISDICTION

This action was brought by the Appellee, Sullivan Mining Company, a corporation organized and existing under the laws of the State of Idaho, against the Appellant, Reconstruction Finance Corporation, a corporation organized and existing under and by virtue of the laws of the United States of America, the capital stock of which said corporation is wholly owned by the United States Government. The action was predi-

cated upon a certain Letter Agreement made and entered into between the Metals Reserve Company, a corporation also created by an Act of Congress on or about June 28, 1940, and the Sullivan Mining Company, an Idaho corporation, and amendments made to said Letter Agreement dated July 12, 1944, covering the purchase and stockpiling of zinc concentrates for the account of Metals Reserve Company; and the claim by Sullivan Mining Company that, under said Letter Agreements it is entitled to the payment of sums aggregating $54,864.10, together with interest thereon at the rate of 6% per annum from October 12, 1948.

The Metals Reserve Company was dissolved by an Act of Congress dated June 30, 1945, 15 U. S. C. A., Section 611, and by said Act all of its functions, commitments and liabilities were transferred to and assumed by the Appellant, Reconstruction Finance Corporation (Tr. 5).

The controversy was, therefore, a controversy, which at the time of the commencement of the action was and still is between Sullivan Mining Company, an Idaho corporation, and a citizen of the State of Idaho as Appellee, and Reconstruction Finance Corporation, a corporation organized and existing under and by virtue of the laws of the United States of America, the capital stock of which said corporation is wholly owned by the United States Government, and the amount in controversy is and was at the time of the commencement of

the action in excess of Three Thousand Dollars and involves the construction and interpretation of certain Agreements, Assignments and correspondence between the parties.

Jurisdiction of the District Court is based upon the provisions of 15 U. S. C. A., Section 603 (a) (Tr. 4).

The Appeal to this Court is from the final judgment decreeing that the Appellee, Plaintiff below, have judgment against Appellant, Defendant below, in the sum of $54,864.10, together with interest at the rate of 6% per annum from October 12, 1948, and from an Order denying Defendant's Motion for a new trial entered February 15, 1955. Notice of Appeal was filed in the office of the Clerk of the District Court for the District of Idaho, Northern Division, on the 12th day of March, 1955, and jurisdiction is believed to exist under Section 225 (a) and (d), Title 28 U. S. C. A. and (d) Title 28 Section 225 (a) and (d) Title 28 U. S. C. A. Judicial Code, Sec. 128 amended (Tr. 29 to 33).

STATEMENT OF THE CASE

On February 9, 1942, the Office of Price Administration issued a release announcing that for the purpose of expanding the output of copper, lead and zinc by domestic mine operators, the United States Government, acting through Metals Reserve Company (a corporation created under the Reconstruction Finance Corporation Act) would, for a period of two and one-half years beginning as of February 1, 1942, pay certain premium prices for all copper, lead and zinc which should be produced under certain specified quotas based upon 1941 production from the particular properties to which such quotas should be assigned (plaintiff's Exhibit No. 1). The aforesaid announcement was followed by a letter dated February 12, 1942, from Metals Reserve Company to Sullivan Mining Company, explaining in detail the operation of the premium price plan and requesting Sullivan Mining Company to act as the agent of Metals Reserve Company in the administration of the program (Plaintiff's Exhibit No. 2). The Agency was accepted by Sullivan Mining Company (Tr. 44).

Pursuant to Sullivan Mining Company's acceptance of such Agency, the Metals Reserve Company caused to be drafted in Washington, D. C., and signed by its executive Vice-President and then forwarded to Sullivan Mining Company for its approval and execution, the Letter Agreement which was admitted in evi-

dence as Plaintiff's Exhibit No. 3 (Tr. 46). This Letter was dated June 18, 1942. It was executed by Sullivan Mining Company in the exact form in which it was submitted.

This Agreement provided that Sullivan Mining Company, as agent for Metals Reserve Company, should purchase for the account of Metals Reserve Company, zinc concentrates in specified monthly quantities. These concentrates were to be stockpiled by Sullivan Mining Company at its own expense, on its property at Silver King, Idaho, in such a manner that such stockpile would be segregated and entirely independent from, and in no way connected with, any other stockpile heretofore or hereafter existing on the property of the Sullivan Mining Company.

The Agreement further provided that the material purchased for the account of Metals Reserve Company would, if in excess of the producer's monthly production quota, be eligible for premium payments in accordance with the established procedure then in effect.

The Agreement also contained the following provision:

> "We understand that you desire the material purchased hereunder for our account to be sold to you from time to time as you are able to treat same. In such connection, you will advise us in writing of the quantity and quality of material desired and the date when same will be needed" (Pls. Ex. 3).

Thereafter, on July 12, 1944, the original Letter Agreement (Plaintiff's Exhibit No. 3) was amended by Plaintiff's Exhibit No. 6. Subdivision 2 of this Amended Letter Agreement provides as follows:

> "If this Company should for any reason remove material from stockpile for any purpose other than for sale to you, you will be reimbursed for actual out-of-pocket expense incurred in connection therewith upon receipt from you of your signed statement reflecting the nature of each item of expense or cost and summarizing the work performed to which the charges apply (i.e. the tonnage removed, weighed and handled)."

Thereafter between August 9, 1944, the date of said Contract modification and December 1, 1948, said Metals Reserve Company and Reconstruction Finance Corporation removed 19,224.06 tons of said zinc concentrates stockpiled by the Plaintiff upon which Plaintiff incurred actual out-of-pocket expense in connection with the input of concentrates and in erecting and maintaining the stockpile "as distinguished from the removal of concentrates" in the sum of $14,595.39. It is not disputed that all expenses in connection with the actual removal of said concentrates by Metals Reserve Company and Reconstruction Finance Corporation have been paid (Ex. 36, first three pages).

That at the time the amendment to the original stockpiling Contract was made July 12, 1944 (Plaintiff's Exhibit No. 6), said Letter Agreement provided among other things as follows:

> "Metals Reserve may assign its interest under this Contract to any other branch or agency of the Government of the United States of America, and upon such assignment such assignee shall acquire all the rights, powers and privileges of Metals Reserve hereunder, and shall be bound by all the duties and obligations of Metals Reserve hereunder, and Metals Reserve shall thereby cease to have any rights, powers, privileges, duties or obligations hereunder, it being expressly understood that any such assignment by Metals Reserve of its interest in this contract shall be subject to all the rights, powers and privileges of contractor hereunder and shall be conditioned upon such assignee's assuming all duties and obligations of Metals Reserve hereunder."

That on or about the 22nd day of October, 1948, Plaintiff, Sullivan Mining Company was advised by letter from Defendant (Plaintiff's Exhibit No. 17) that the Defendant was going to transfer and assign the physical custody of the entire government stockpiles of zinc concentrates stored by Sullivan Mining Company to the Treasury Department, Bureau of Federal Supply, which has since become Emergency Procurement Service under General Services Administration. That said assignment was duly made and became effective on the 30th day of November, 1948. That said Assignment provided among other things that (Plaintiff's Exhibit No. 22):

> "It being expressly understood and agreed that said Assignee shall hereby acquire all the rights, powers and privileges of Assignor under said agreement, as amended, and Assignor shall here-

> by cease to have any rights, powers, privileges, duties or obligations under said agreement, as amended, it being further expressly understood that this assignment by Assignor of its interest in said agreement as amended shall be and is subject to all the rights, powers and privileges of said Sullivan Mining Company under said agreement as amended, and shall be and is conditioned upon Assignee's assuming all duties and obligations of Assignor under said agreement as amended."

That subsequent to said assignment, the Bureau of Federal Supply (Treasury Department) caused to be removed 53,039.58 tons of such stockpile concentrates upon which the Plaintiff had incurred an actual out-of-pocket indebtedness in placing said concentrates in storage and maintaining stockpile facilities in the sum of $40,268.71. That all expenses in connection with the actual removal of said concentrates from the stockpile subsequent to September 1, 1948, were paid for by the Bureau of Federal Supply (Treasury Department).

It was apparently the theory of the Trial Court that the interpretation of the amended letter agreement (Plaintiff's Exhibit No. 6) required the Defendant to pay to the Plaintiff all of its out-of-pocket expenses incurred not only in connection with the removal of the material from the stockpile for sale to other parties, but also required the Defendant to pay to the Plaintiff all costs in connection with the establishment and maintenance of the stockpile from the date of the inception of the original Letter Agreement (Plaintiff's

Exhibit No. 2). It also appears that it was the theory of the Trial Court that the Assignment (Plaintiff's Exhibit No. 22) and the acceptance of the Assignment by the Plaintiff, Sullivan Mining Company (Defendant's Exhibit No. 35) did not relieve Reconstruction Finance Corporation from liability for concentrates removed from the stockpile subsequent to November 30, 1948 (Tr. 16, 17, 18).

SPECIFICATIONS OF ERROR

1. The District Court erred in disregarding the plain language of that portion of the original Letter Agreement (Plaintiff's Exhibit No. 3) which provided that the Plaintiff, Sullivan Mining Company, would stockpile at its own expense, all materials purchased under the Agreement.

2. The District Court erred in completely disregarding the storage and ownership certificate in the form of Exhibit "A" attached to the original Letter Agreement (Plaintiff's Exhibit No. 3) which provides that the zinc concentrates stockpiled by Plaintiff "are owned by the Metals Reserve Company or the holder thereof and will be released and delivered by the holder hereof upon the surrender of the certificate properly endorsed."

3. The District Court erred in its interpretation of that part of the amended Letter Agreement dated July 12, 1944 (Plaintiff's Exhibit No. 6), which reads as follows:

> "If this Company (Metals Reserve Company) should for any reason remove material from stockpile for any purpose other than for sale to you (Sullivan Mining Company), you will be reimbursed for actual out-of-pocket expense incurred in connection therewith upon receipt from you of your signed statement reflecting the nature of each item of expense or cost and summarizing the

> work performed to which the charges apply (i.e. the tonnage removed, weighed and handled)."

in that the Court found that the words "actual out-of-pocket expense incurred in connection therewith" referred not only to the cost of removal of the concentrates shipped elsewhere but also to the cost of establishing and maintaining the stockpile from the inception of the original Letter Agreement (Plaintiff's Exhibit No. 3).

4. The District Court erred in not finding as a matter of law, that the Defendant, Reconstruction Finance Corporation was relieved of all liability to Plaintiff with reference to the original stockpiling agreement (Plaintiff's Exhibit No. 3) and amendments thereto, subsequent to November 30, 1948, by virtue of assignment of the contract to the Bureau of Federal Supply (Treasury Department) dated November 30, 1948 (Plaintiff's Exhibit No. 22); and it was error even if any liability did exist under the original contract or amendments thereto to enter judgment in any sum against the Defendant, Reconstruction Finance Corporation in excess of $14,595.39, for the reason that the assignment (Plaintiff's Exhibit No. 22) and the approval and acceptance of the assignment by the Plaintiff, Sullivan Mining Company (Defendant's Exhibit No. 35), fully relieved the Defendant, Reconstruction Finance Corporation from any and all liability to Plaintiff, Sullivan Mining Company, for concen-

trates removed from the stockpile after November 30, 1948.

5. The District Court erred in making and entering Finding of Fact No. V, as follows:

> "It was the understanding of both parties to said contract that in consideration of the Plaintiff's stockpiling said concentrates at its own expense it was to have the right to re-purchase said concentrates and to process and market the same and thus derive a profit as it would in the case of its usual custom smelting operations."

because the evidence does not support any such agreement.

6. The District Court erred in making and entering Finding of Fact No. IX, as follows:

> "It was the plaintiff's understanding and was also the understanding and the intent of the Government at the time said amendment of July 12, 1944, was drafted by the Government and approved by the plaintiff that the plaintiff was to bear the expense of stockpiling all concentrates which should thereafter be processed by the plaintiff but that the plaintiff was to be reimbursed by the Government for all expenses incurred by the plaintiff in stockpiling any and all concentrates which might be removed by the Government and shipped to other smelters for treatment."

because there is no evidence in the record to support the same.

7. The District Court erred in making and entering that part of Finding of Fact No. XVII which reads as follows:

> "The plaintiff offered to purchase these remaining stockpile concentrates but its offer was not accepted."

because such Finding is against the clear weight of the evidence.

8. The District Court erred in disregarding the provisions of the contract (Plaintiff's Exhibit No. 3) and the Amendment thereto (Plaintiff's Exhibit No. 6) and basing its decision upon the assumption that the stockpiling of the concentrates was solely for the benefit of Reconstruction Finance Corporation (Memorandum Opinion, Tr. 16).

9. The evidence introduced by Plaintiff is entirely insufficient to support the judgment and the Defendant's Motion to enter a judgment in its favor should have been granted.

10. The Complaint alleges a specific Agreement for reimbursement for the cost of stockpiling. The clear weight of the evidence indicates that there was no such Agreement and the District Court, by its decision, has attempted to write a new Agreement for the parties.

11. The District Court erred in admitting in evidence, over Defendant's objection, Plaintiff's Exhibit No. 21 (Tr. 99) for the reason that said Exhibit is a Contract sent to Sullivan Mining Company by the Bureau of Federal Supply (Treasury Department) which said Bureau of Federal Supply has not been made a party to the action and for the further reason that said Contract (Plaintiff's Exhibit No. 21) was never executed and, therefore, became incompetent as to any issue involved in the litigation.

12. The District Court erred in admitting in evidence, over Defendant's objection, Plaintiff's Exhibit No. 23 (Tr. 104), for the reason that said Exhibit consisted of correspondence between Plaintiff, Sullivan Mining Company, and the Bureau of Federal Supply (Treasury Department) and becomes heresay and otherwise irrelevant, incompetent and immaterial because the Bureau of Federal Supply (Treasury Department) is not a Party Defendant to this action and also because the Defendant, Reconstruction Finance Corporation, by virtue of Assignment dated November 30, 1948 (Plaintiff's Exhibit No. 22), ceased to have any rights, powers, privileges, duties or obligations under the original Contract (Plaintiff's Exhibit No. 3) and amendments thereto.

ARGUMENT

Interpretation of Letter Agreements

The Specifications of Error Nos. 1, 2, 3, 5, 6, 8, 9 and 10 all deal with what Appellant conceives to be the wrongful interpretation by the Trial Court of the original Letter Agreement (Plaintiff's Exhibit No. 3) and amendatory Letter Agreement (Plaintiff's Exhibit No. 6) and for the convenience of the Court, we will discuss these specifications together.

It is the theory of the Appellant that there was no agreement, either express or implied, whereby Appellant agreed to reimburse Sullivan Mining Company for establishing the stockpile or for unloading materials into the stockpile. The original Letter Agreement (Plaintiff's Exhibit No. 3) cannot be so construed. The case was tried on the theory that there was a written agreement between Appellant and Sullivan Mining Company to pay for the cost of establishing and maintaining a stockpile. No such agreement was ever established and it became the duty of the District Court to decide the case in favor of the Defendant, Reconstruction Finance Corporation, because of a complete failure of proof on the part of the Appellee, Sullivan Mining Company, to sustain the allegations of its Complaint.

The original Letter Agreement (Plaintiff's Exhibit No. 3) expressly provides for the stockpiling of such material by the Sullivan Mining Company at its own expense. This Agreement was amended at various times at Sullivan's request in order to increase the amount of zinc concentrates that could be purchased monthly and the aggregate amount that could be purchased.

The Amended Letter Agreement (Plaintiff's Exhibit No. 6), dated July 12, 1944, and accepted by the Mining Company on August 9, 1944, reads in part as follows:

> "If this Company (Metals Reserve Company) should for any reason remove material from stockpile for any purpose other than for sale to you (Sullivan Mining Company), you will be reimbursed for actual out-of-pocket expense incurred in connection therewith upon receipt from you of your signed statement reflecting the nature of each item of expense or cost and summarizing the work performed to which the charges apply (i.e. the tonnage removed, weighed and handled)."

By a letter, dated February 13, 1951 (Plaintiff's Exhibit No. 36), Messrs. Shinn, Grimes, Harlan, Strong and Carson, Washington counsel for Sullivan Mining Company, submitted a claim in the amount of $14,595.39 predicated upon the above quoted paragraph of the Amendatory Agreement of July 12, 1944. They took the position that the word "therewith" modified or referred to the word "material" and that consequently,

Sullivan Mining Company was entitled to reimbursement for out-of-pocket expenses incurred in connection with the stockpiling of the material which was removed by Metals Reserve Company or Reconstruction Finance Corporation. It was the contention of the Appellant, that a proper interpretation of this paragraph would be that Sullivan Mining Company would be reimbursed for actual out-of-pocket expenses incurred in connection with the removal of the material from stockpile, and since Sullivan Mining Company had been reimbursed for expenses incurred in the removal of such material, the claim was denied (Plaintiff's Exhibit No. 12).

The Complaint filed in this case against Reconstruction Finance Corporation (successor to Metals Reserve Company) in the District Court of the United States for the District of Idaho, Northern Division, alleges in Paragraphs V and VI and VIII thereof, as follows:

"V.

"On or about June 18, 1942, plaintiff entered into a contract in writing with said Metals Reserve Company in and by which it was provided and agreed, among other things, that plaintiff, as agent for said Metals Reserve Company, should purchase for the account of said Metals Reserve Company zinc concentrates in specified monthly quantities, the purchase price of said concentrates to be paid by Metals Reserve Company: that said concentrates so purchased should be stockpiled by the plaintiff at its expense and should thereafter

be sold by said Metals Reserve Company to the plaintiff from time to time as the plaintiff should be able to process the same at its said smelter Tr. 4).

"VI.

"That a modification of said contract was thereafter, to-wit, on August 9, 1944, approved in writing by plaintiff and said Metals Reserve Company providing that said Metals Reserve Company should have the right at its sole option to remove all or any part of the zinc concentrates purchased and stockpiled by the plaintiff for the account of Metals Reserve Company, the plaintiff, however, to be then reimbursed for actual out-of-pocket expense incurred by the plaintiff in connection with the concentrates so stockpiled and then removed by Metals Reserve Company (Tr. 4 and 5).

"VIII.

"That between August 9, 1944, the date of said contract modification, and December 1, 1948, said Metals Reserve Company and Reconstruction Finance Corporation removed 19,224.06 tons of said zinc concentrates stockpiled by the plaintiff upon which the plaintiff had incurred actual out-of-pocket expense in the sum of $14,595.39, and subsequent to December 1, 1948, the defendant, Reconstruction Finance Corporation, removed or caused to be removed 53,039.58 tons of such stockpiled concentrates upon which the plaintiff had incurred actual out-of-pocket expense in the sums of $40,268.71 (Tr. 5).

* * * * *

"WHEREFORE, plaintiff prays judgment against defendant for the sum of $54,864.10, to-

gether with interest thereon at the rate of 6% per annum from October 12, 1948, and for plaintiff's costs incurred herein" (Tr. 6).

First, it should be pointed out that the allegation in paragraph 5, to the effect that said concentrates so purchased should be stockpiled by the plaintiff, at its own expense and thereafter should be sold by said Metals Reserve Company to the plaintiff from time to time, as the plaintiff should be able to process the same at its smelter, is not entirely accurate, because attached to the Letter Agreement of June 18, 1942 (Plaintiff's Exhibit No. 3), was a Storage and Ownership Certificate referred to in the Letter Agreement as "Exhibit A." This Storage and Ownership Certificate provides that zinc concentrates after being stockpiled are owned by Metals Reserve Company, or the holder of the Certificate, which language clearly indicates that the material stockpiled might be sold to some purchaser other than Sullivan Mining Company. In addition, it is stated in the body of the Letter Agreement (Plaintiff's Exhibit No. 3):

> "In order to encourage the continued production of this material in your district, deemed necessary in the war effort, this company will purchase an amount of this material, for a period of time, tendered to you in excess of your smelting capacity as hereinafter stated."

This language simply means that Metals Reserve Company would purchase such material in excess of

plaintiff's smelting capacity in order to encourage the production of such material in said district, and you cannot read into such language any intent to purchase such material exclusively for the smelting operation of Sullivan Mining Company.

The allegation in Paragraph 6 of the complaint above quoted to the effect that the plaintiff was to be reimbursed for actual out-of-pocket expense incurred by the plaintiff in connection with the concentrates so stockpiled and then removed by Metals Reserve Company has been denied by appellant in its answer (Tr. 8). This brings us to the interpretation of that part of the amended Letter Agreement dated July 12, 1944, heretofore quoted (Plaintiff's Exhibit 6). The question, of course, is whether it was the intention of the parties that the Metals Reserve Company should reimburse Sullivan Mining Company for out-of-pocket expenses incurred in connection with the removal of material from the stockpile for sale to other parties, or whether it was the intention that Metals Reserve should reimburse Sullivan Mining Company for out-of-pocket expense incurred in connection with establishing and maintaining the stockpile as well as the removal of the material that was sold to other parties.

In order to arrive at the proper interpretation of the foregoing quoted paragraph, it is necessary to read the original Agreement (Plaintiff's Exhibit No. 3), and all amendments thereto. First, it should be pointed

out that Sullivan Mining Company, under the Agreement, was acting as agent for Metals Reserve Company in connection with Metals Reserve Company's premium payment program covering excess quota production of copper, lead and zinc; and the Sullivan Mining Company agreed to purchase such materials for the account of Metals Reserve Company; and in the Letter Agreement of June 18, 1942 (Plaintiff's Exhibit No. 3), the Sullivan Mining Company agreed (top of page 2 of said Letter Agreement) that it would stockpile at its own expense such materials so purchased. It was also agreed in said Letter Agreement of June 18, 1942 (last two lines of page 3 of said Letter Agreement), that the services of Sullivan Mining Company, as agent under said agreement, would be rendered without compensation from Metals Reserve Company.

In construing the Letter Amendment of July 12, 1944 (Plaintiff's Exhibit No. 6), it is necessary to determine what was meant by the phrase "out-of-pocket expense incurred in connection therewith." Words and Phrases states that the word "therewith," according to the latest standard dictionaries of the English language, is the equivalent in meaning of the words "with that or this," or "at the same time." See *Zartman-Thalman Carriage Company vs. Reid & Lowe,* 73 S. W. 942, 99 Mo. App. 415. It seems clear that the word "therewith" in this instance referred to the removal of the material

from the stockpile. It certainly would be a strained construction if "therewith" referred to the stockpiling of the material as well as the removal of the material from the stockpile, especially since it is clear from the Agreement that the Sullivan Mining Company would stockpile the material at its own expense, and would act as agent thereunder for Metals Reserve Company without compensation. In short, the Metals Reserve Company agreed that, if any of the material was removed from the stockpile and sold to other parties, it would reimburse Sullivan Mining Company for any expense it might have incurred in removing the material from the Sullivan Mining Company stockpile for transportation to the purchasers.

It should also be noted that at the time the Amended Letter Agreement of July 12, 1944 (Plaintiff's Exhibit No. 6), was entered into, certain of the materials had already been stockpiled and Metals Reserve Company had title thereto free and clear of any charge for stockpiling. It was recognized that if some of the materials were removed from the stockpile, Sullivan Mining Company might incur some out-of-pocket expense in connection with the removal of such material from the stockpile for which it should be reimbursed, and it was for that reason that the paragraph of the Letter Amendment of July 12, 1944, herein quoted, was inserted.

The first paragraph on page 2 of the Letter Agreement of June 18, 1942 (Plaintiff's Exhibit No. 3), reads as follows:

> "We will effect settlement with you on a monthly basis for the amount of material purchased for our account as aforesaid, following receipt from you monthly by our Traffic Manager of (1) your invoice, accompanied by your Storage and Ownership Certificate in the form of Exhibit "A" hereto attached, and (2) copy of your settlement sheet with each producer covering material so purchased."

And the Certificate referred therein as Exhibit "A" states:

> ". . . that said zinc concentrates are owned by Metals Reserve Company, or the holder thereof, and will be released and delivered to the holder hereof upon surrender of this certificate properly endorsed."

The only interpretation that can be put on the foregoing provisions is that full settlement in connection with the purchase and stockpiling of material was to be made by Metals Reserve Company each month, and that when a monthly settlement was effected in accordance with the Agreement, title to the material vested in Metals Reserve Company, or its assignees, free from any charges or expenses which might have been incurred by the Mining Company up to that time.

It may be contended that, if the parties had intended that reimbursement be confined to the cost of the removal of the material, the words "cost of removal" should have been used. This could be answered by stating that, if it were the intention of the parties for Metals Reserve Company to reimburse the Sullivan Mining Company for expenses in connection with the stockpiling of the material as well as the removal of the material, the parties should have used the words, "you will be reimbursed for actual costs incurred in connection with the stockpiling and the removal of the material."

CONTRACT TO BE CONSTRUED AS A WHOLE

We emphasize that the contract must be construed as a whole. In this connection, it is stated in 17 Corpus Juris Secundum, Sec. 297 (pp. 707-711), as follows:

> "A contract must be construed as a whole, and the intention of the parties is to be collected from the entire instrument and not from detached portions, it being necessary to consider all of its parts in order to determine the meaning of any particular part as well as of the whole.
>
> "Individual clauses in an agreement and particular words must be considered in connection with the rest of the agreement, and all parts of the writing, and every word in it, will, if possible, be given effect."

Also to the same effect, see 3 *Willeston on Contracts* (Revised Edition), Sec. 618, page 1779.

In construing the contract as a whole, one must come to the conclusion that the Sullivan Mining Company was to purchase the material as agent for Metals Reserve Company and stockpile the same on its property at its own expense; that Metals Reserve Company was to effect settlement with the Sullivan Mining Company on a monthly basis for the material so purchased and stockpiled; that upon receipt of such payment and delivery of the Certificate of Ownership to Metals Reserve Company, title to the material vested

in Metals Reserve Company free and clear of all charges and expenses which may have been incurred by the Sullivan Mining Company up to that time. In short, the required terms and conditions of the contract to be performed up to that time would have been fully performed and the considerations thereunder fully satisfied by both parties. It naturally follows, therefore, that the phrase, "out-of-pocket expenses incurred in connection therewith" in the Amendatory Letter Agreement of July 12, 1944 (Plaintiff's Exhibit No. 6), could refer only to expenses incurred subsequent to the stockpiling of the material and could not include charges or expenses incurred prior to or in connection with the stockpiling of such material.

It cannot be denied that if the Sullivan Mining Company decided to purchase any of the material owned by Metals Reserve Company and stockpiled on the property of the Sullivan Mining Company, then the Sullivan Mining Company was to pay Metals Reserve Company the purchase price agreed upon and remove the same to its own smelter at its own expense. If, however, Metals Reserve Company should sell any of the material so stockpiled to a purchaser other than the Sullivan Mining Company, there would be some question as to who would go upon the property of the Mining Company to remove the material for shipment to the other purchaser, and what permission was necessary to be granted to the purchaser or its agent to go

upon the property of the Sullivan Mining Company for such purpose. Therefore, it was deemed advisable to have a definite understanding with the Sullivan Mining Company that, if it removed the material from the stockpile, weighed, and delivered it at railroad cars or trucks for transportation to the purchaser, the Sullivan Mining Company should be reimbursed for the out-of-pocket expense incurred in connection with the removal of the material. Hence, the amendment to the contract whereby Metals Reserve Company agreed to reimburse the Sullivan Mining Company for out-of-pocket expense incurred by it in connection with the removal of the material from the stockpile when sold to purchasers other than Sullivan Mining Company.

CONDUCT AND ACTS OF THE PARTIES

The District Court appears to have predicated its decision to a large extent upon the theory that it would work a great injustice upon the Sullivan Mining Company if it was not paid the money actually spent in establishing and maintaining the stockpile in question. It is the contention of appellant that the moving consideration which prompted Sullivan Mining Company to participate in the stockpiling program was not based upon expectations of anticipated profits from processing the concentrates at some undetermined future time, but was based upon the large profits that Sullivan Mining Company and its affiliates would make from full production, high metal prices and the premium payment on over-quota production, together with the benefits which would inure to the entire Coeur d'Alene Mining District in which Sullivan Mining Company had a vital and far-reaching interest. Mr. Woolf, the Superintendent of Sullivan Mining Company, testified as follows:

> "Q. Mr. Woolf, from time to time in the course of this hearing reference will be made to the Bunker Hill and Sullivan Mining and Concentrating Company, what, if any, relation exists between the Sullivan Mining Company and the Bunker Hill and Sullivan Mining and Concentrating Company?"
>
> "A. The Sullivan Mining Company is owned by the Bunker Hill and Sullivan Mining and Con-

centrating Company, and the Hecla Mining Company, each company having a 50% ownership. The Sullivan Mining Company operates the Electrolytic zinc plant, and it also operates its own Star Mine. The management of the zinc plant is under the general manager of the Bunker Hill and Sullivan Mining and Concentrating Company; Mr. Haefner, who is my superior—the operation of the Star Mine is under the management of the Hecla Mining Company" (Tr. 41 and 42).

A little later, we find the following testimony by Mr. Woolf:

"Q. What is the Bunker Hill Smelter?"

"A. The Bunker Hill Smelter is owned by the Bunker Hill and Sullivan Mining and Concentrating Company, which, as I have testified earlier, owns one-half of the Sullivan Mining Company. The Sullivan Mining Company is an affiliate, and Mr. Haefner is the general manager of the Bunker Hill and Sullivan Mining and Concentrating Company, and also of the zinc plant, and the result is that the Bunker Hill Smelter and the zinc plant cooperate very closely, because of the close connection between the two" (Tr. 49).

Keeping in mind the above corporate structures, let us see from the testimony how each was benefited by the Government's over-quota production premium payment and stockpiling program. Mr. Woolf, on cross-examination, testified as follows:

"Q. Yes, tell me if you can what mines besides your mine or mines operated by you, or in which

the Sullivan Mining Company had a financial interest, were shipping to this stockpile?"

"A. To my recollection, the only mine the Sullivan Mining Company was interested in financially was its Star Mine that is owned and operated by the Sullivan Mining Company."

"Q. There were concentrates shipped to that stockpile that came out of Bunker Hill and Sullivan Mine?"

"A. Yes, we treat and process these zinc concentrates from the Bunker Hill and Sullivan Mine."

"Q. And there were concentrates that went into stockpile that came from the Hecla?"

"A. The Hecla Mining Company, as a result of the premium price plan, processed tailings that had been lying for many years in the Coeur d'Alene River Valley—these concentrates, i.e., the concentrates resulting from the tailing treatment, were also sold to the Sullivan Mining Company and shipped to the stockpile" (Tr. 130-131).

It appears self-evident that if appellant has shown that the Star Mine, owned and operated by Sullivan Mining Company, was receiving substantial benefits by virtue of the Government's stockpiling and premium payment program, then an independent consideration entirely unrelated to any benefits that might be derived from processing would be established to support the Original Letter Agreement and Amendatory Agreement (Plaintiff's Exhibits Nos. 3 and 6).

In this connection it was established through defendant's Exhibit No. 30 and testimony by Mr. Woolf (Tr. 133, 134, 135) that out of a total of 72,000 tons put into stockpile for Metals Reserve Company, 51,000 tons were produced by the Star Mine, owned and operated by the Sullivan Mining Company. In addition thereto, Sullivan Mining Company processed, and did not put into the Metals Reserve Company stockpile, 82,898.9225 tons of Star Mine concentrates and 40,132 tons of Bunker Hill concentrates between June, 1942, and November, 1946, inclusive (Tr. 140). Add this testimony to that of defendant's Exhibit No. 31 which shows that during the last six months of 1943, the Star Mine had an over-quota premium production of nearly three and one-half million pounds of zinc (Tr. 141) and we can reach but one conclusion, namely, that there was an ample consideration to support both the original Letter Agreement and Amendatory Letter Agreement (Plaintiff's Exhibits Nos. 3 and 6), irregardless of where the concentrates were processed.

It should also be borne in mind (Tr. 137, 138, 139, Exhibit No. 9) that the Sullivan Mining Company was continually requesting Metals Reserve Company to increase the stockpile limits, until the authorization reached the maximum of 80,000 tons. It appears strange that these requests would have been so persistenly made if Sullivan Mining Company was depending for reimbursement only if it could repurchase and

process the stockpiled concentrates at some undetermined future date. Appellee's contention seems especially out of line in view of the testimony that Sullivan Mining Company, at the time the requests were made, did not have the capacity to process any of the stockpiled concentrates whatsoever. The more likely explanation seems to be that Sullivan Mining Company and its parent organization, the Bunker Hill and Sullivan Mining and Concentrating Company, were anxious

First:

> To properly service the Coeur d'Alene mining district for which they would be dependent for future business after the cessation of hostilities.

Second:

> To keep its Star and Bunker Hill Mines producing at full capacity and obtain the advantages of premium payments and high metal prices.

The concern which Sullivan had for the small shipper or small producer and, I am sure that it was not based on purely philanthropic motives, is indicated in Mr. Woolf's direct testimony (Tr. 82-83).

> "Q. At about that time, or shortly thereafter, in 1948, were any other concentrates shipped out to the Anaconda Copper Mining Company?"

> "A. After the termination, after we could no longer store for the Metals Reserve account there was a large tonnage of zinc concentrates offered to us in excess of our capacity to treat and by ar-

rangement with the shippers, we received as much from them as we possibly could and the balance we put in a stockpile, which we called the shippers stockpile and we made arrangements to ship that stockpile to the Anaconda under contract. We paid the shippers to us, the same amount as we received from the Anaconda except that we absorbed the freight from Bradley, the site of the stockpile to the Anaconda Company something like $6.00 per ton. We paid that."

"Q. Was the amount of the shipment that you were then receiving from the shippers in excess of your own smelting capacity and in excess of the amount that go into the government stockpile monthly?"

"A. Yes, as I recall we shipped in excess of 11,000 tons to the Anaconda Company. That was in addition to and had nothing to do with the 17,500 tons that we shipped from the Metals Reserve stockpile."

"The 11,000 tons was not concentrates of the Reconstruction Finance Corporation?"

"A. No."

"Q. Were they concentrates you yourself, that is, your company had purchased?"

"A. We purchased them by agreement with the Producers, with the understanding that we would be able to dispose of them to the Anaconda Company and we did dispose of them to the Anaconda Company. *The object was to maintain the mines in production*" (Emphasis ours).

"Q. You were not stockpiling any concentrates for the Reconstruction Finance Corporation at that time?"

"A. No, sir" (Tr. 82, 83).

From the foregoing, it is apparent that, even after the stockpiling agreement with the government ceased, Sullivan not only continued on its own volition to stockpile for the benefit of its various shippers but also absorbed the costs of shipping from Bradley to the Anaconda Smelter.

SPECIFICATION OF ERROR No. 7

Respondent, Sullivan Mining Company, attempted to prove by Exhibit No. 25, that the Mining Company, on or about August 25, 1949, offered to purchase the concentrates remaining in the stockpile.

The exhibit is a letter addressed to the Treasury Department, Bureau of Federal Supply, from Sullivan Mining Company. Paragraph three of this letter reads as follows:

> "We offered, through Mr. Charles P. Ince, Manager of metal sales of the St. Joseph's Lead Company, to commence treatment of the remaining stored concentrates, approximately 48,000 tons. Our offer was in conformity with the purchase provisions as set forth in the agreement of June 18, 1942; in fact we made a better offer to you than the one so provided, because we agreed to deliver to you 85% of the contained zinc as compared to the payment of 80% of the zinc content as our present zinc concentrates purchase schedules and contracts provide. Notwithstanding this, we are now advised by Mr. Ince that our offer was rejected by you, although as yet we have had no direct advice from you to this effect. We respectfully request that we have your formal advice on this matter" (Tr. 109).

Objection to the admission of Exhibit No. 25 was promptly made by appellant (Tr. 113). Certainly, this letter standing alone is at best a self-serving declaration. The phraseology—

> "We offered through Mr. Charles P. Ince, Manager of St. Joseph's Lead Company, to commence treatment, etc";

is pure hearsay, because Mr. Ince was never called as a witness. We cite further from the letter—

> "We are now advised by Mr. Ince that our offer was rejected by you, etc";

This statement certainly cannot be properly used as evidence when appellant had no opportunity to examine Mr. Ince concerning the purported offer and rejection. The objection of appellant to the admission of Exhibit No. 25 as evidence should have been upheld by the Court.

The District Court must have given Exhibit No. 25 great weight even though it amounted to no more than a self-serving declaration because, in making Finding of Fact No. XVII (Tr. 27), the Court said:

> "Plaintiff offered to purchase these remaining concentrates, but its offer was not accepted."

We feel that no more need be said concerning the incompetency of the testimony upon which this Finding is based. There is no other testimony in the record that the Sullivan Mining Company ever agreed to purchase the concentrates.

It must be borne in mind that appellant first requested Sullivan Mining Company to start processing

the stockpiled concentrates in August, 1946 (Exhibit No. 9, Tr. 157), and again in February, 1948, advised Sullivan Mining Company that the Munitions Board had requested that the permanent stockpile be made available to them and that capacity for treatment of the concentrates was available at other smelters if Sullivan Mining Company could not process the same (Exhibit No. 11, Tr. 72).

OTHER HEARSAY TESTIMONY

The District Court permitted the introduction of Exhibit No. 21, being a letter addressed to Sullivan Mining Company, together with Contract embodying an agreement Between the Bureau of Federal Supply, Treasury Department, and the Sullivan Mining Company, covering the stockpile after Reconstruction Finance Corporation had assigned all of its rights in the original stockpiling agreements to the Bureau of Federal Supply, Treasury Department. This Contract was never executed and for this reason is incompetent, irrelevant and immaterial and being a Contract drawn by the Bureau of Federal Supply and not by Reconstruction Finance Corporation would constitute hearsay testimony insofar as appellant is concerned. The same objection applies to Exhibit No. 23 (Tr. 104).

EFFECT OF ASSIGNMENT FROM RECONSTRUCTION FINANCE CORPORATION TO UNITED STATES OF AMERICA, TREASURY DEPARTMENT, BUREAU OF FEDERAL SUPPLY

Appellant believes that one further observation should be made. Without conceding, in any manner, that Sullivan Mining Company is entitled to any reimbursement whatsoever for the costs of establishing and maintaining the stockpile, it is submitted that in any event, Reconstruction Finance Corporation, the

Defendant below, and Appellant herein, could only be liable for the 19,224 tons of zinc concentrates removed by it previous to December 1, 1948, in which Plaintiff seeks recovery of $14,595.39. The Amendatory Letter Agreement made July 12, 1944 (Plaintiff's Exhibit No. 6), provided, among other things:

> "Metals Reserve may assign its interest under this contract to any other branch or agency of the Government of the United States of America, and upon such assignment such assignee shall acquire all the rights, powers and privileges of Metals Reserve hereunder, and shall be bound by all the duties and obligations of Metals Reserve hereunder, and Metals Reserve shall thereby cease to have any rights, powers, privileges, duties or obligations hereunder, it being expressly understood that any such assignment by Metals Reserve of its interest in this contract shall be subject to all the rights, powers and privileges of contractor hereunder and shall be conditioned upon such assignee's assuming all duties and obligations of Metals Reserve hereunder."

By virtue of the above provision the contract as amended, was assigned to the Bureau of Federal Supply November 30, 1948 (Plaintiff's Exhibit No. 22). This assignment provided:

> "It being expressly understood and agreed that said assignee shall hereby acquire all the rights, powers and privileges of assignor under said agreement as amended and shall be bound by all the duties and obligations of assignor under said agreement as amended and assignor shall hereby cease

> to have any rights, powers, privileges, duties or obligations under said agreement as amended."

As set forth on page 115 of the Transcript, Appellee's attorney made the following observation to the Court:

> "Our point is that the stockpiling costs were out-of-pocket but the liability did not accrue until the concentrates were removed because no one knew at that time or until then how many were going to be removed."

It seems clear, therefore, that by virtue of the assignment (Exhibit No. 22), all concentrates removed after November 30, 1948, became the responsibility of the Bureau of Federal Supply and the responsibility of appellant, if any, ceased as of that date.

The Bureau of Federal Supply is an arm of the Treasury Department of the United States Government and has not been made a party to this action. It seems inconceivable that even though liability had existed prior to November 30, 1948, that Reconstruction Finance Corporation could be held liable for concentrates removed subsequent to the assignment of the contract to the Bureau of Federal Supply (Treasury Department), on November 30, 1948.

We call attention to Defendant's Exhibit No. 35, which is a letter addressed to the Sullivan Mining Company by appellant, dated November 9, 1948, and approved by Sullivan Mining Company November 15,

1948, by W. G. Woolf. Paragraph 2 provides as follows:

> "Accordingly, you are requested to accept this letter as a release of all material remaining in stockpile to Treasury Department, Bureau of Federal Supply, effective as of the close of business November 30, 1948. In accordance with the above, all charges incurred in connection with this material will be for the account of and you will bill such charges to Bureau of Federal Supply effective as of December 1, 1948. Our legal division is arranging to assign the underlying contract involved in this storage operation."

It is evident therefor that Sullivan Mining Company not only had notice that the responsibility of appellant ceased on November 30, 1948, but also approved and confirmed the arrangement whereby the Bureau of Federal Supply was substituted as a new debtor in place of appellant.

4-American Jurisprudence, ASSIGNMENTS, Page 233, has this to say:

> "At the outset, it should be noted that a party to a contract may not assign an obligation so as to avoid liability thereon and shift liability to the assignee, only rights under a contract can be assigned. It is otherwise, of course, where the assignee assumes the obligation of the assignor with the consent of the other party to the contract and the latter releases the assignor from further liability; *in such case there is a novation.*"
>
> (See 20 R. C. L., P. 359.)

In 66-C. J. S.—NOVATION—Page 682, we find the following:

METHODS OF NOVATION

> "The Courts have frequently recognized that a novation may be effected by the substitution of a new obligation between the same parties with intent to extinguish the old obligation, or a new debtor in the place of the old debtor, with intent to release the latter, or of a new creditor in place of the old one, with intent to transfer the rights of the latter to the former."

In *Moers vs. Moers,* 14 A. L. R., 225-229 N. Y. 294; 128 NE 202, the Court says:

> "A new executory agreement, whether performed or not, may be accepted in satisfaction of a previous obligation or liability; and if it is so accepted, the remedy for breach thereof is upon the new, and not the old agreement."

In *Wanamaker vs. Comfort,* 53 Fed. (2) 751, A. L. R. 133, the Court makes this observation:

> "Novatation is to be determined by ascertaining the intent of the parties from the evidence in each particular case."

In *Watts vs. Smith,* 91 A. L. R. 1206, 63 SW (2) 796, it is stated that:

> "The assent necessary to effect a novation need not be in express words, but may be implied from circumstances and subsequent conduct of the parties."

CONCLUSION

First: Judgment should have been granted appellant in the District Court because under the original Letter Agreement as amended, there was no contractual obligation entered into whereby appellant agreed to reimburse Sullivan Mining Company for the costs of establishing and maintaining the stockpile.

Second: That if any legal liability did exist against Reconstruction Finance Corporation then it should be limited to the sum of $14,595.39 for concentrates removed from the stockpile previous to the assignment of the contract by Reconstruction Finance Corporation to the Bureau of Federal Supply (Treasury Department), which assignment was approved and accepted by the Sullivan Mining Company.

Respectfully submitted,

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